IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 117 OF 1989

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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SHRICHAND HOTCHAND BHABHANIA - Appellant(s)
Versus
RAJKOT MUNICIPAL CORPORATION - Respondent(s)

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Appearance :
SHRI P.V. HATHI for Appellant(s).
SHRI BHASKAR P. TANNA, SR. ADVOCATE, With
SHRI NIKHIL S. KARIEL, for Respondent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 07/11/2006

ORAL JUDGMENT

1. The present Second Appeal has been admitted for hearing the parties on 23rd June, 1989, but, no substantial question of law has been framed, however, after hearing the learned Counsel for the appellant and

going through the Appeal Memo, I must hold that the following substantial question of law arises in the present matter:

> *"Whether on the facts and in the circumstances of the case, the learned first Appellate Court, while decreeing the suit for reinstatement, was justified in denying the back-wages on the ground of his personal observations that the appellant did not appear to be in bad condition or absolutely unemployed?"*

2. The short facts of the case are that the plaintiff was appointed as a Deputy Engineer in the Office of Rajkot Municipal Corporation after being selected by the Selection Committee of the Corporation by an Order dated 28th March, 1978, his appointment was extended from time to time, the last extension was upto 27th July, 1979 and thereafter, the services were not extended, however, *vide* Resolution dated 18th October, 1979, the General Body of the defendant-respondent, decided to terminate the services of the plaintiff and *vide* Order dated 19th October, 1979, the services came to be terminated.

2.1 Being aggrieved by the order of termination, the plaintiff filed Civil Suit No.1132 of 1979, seeking a declaration that the decision of the Corporation and the

consequential order of termination were illegal and bad, he prayed for setting aside the order of termination, reinstatement and back-wages.

2.2 After hearing the parties and recording the evidence, the learned trial Court dismissed the suit, but, on an appeal, the learned first Appellate Court held that the order of termination was illegal as before terminating the services of the plaintiff, a statutory notice was not given; it, accordingly, directed reinstatement of the plaintiff, but, at the same time, observed that the plaintiff would not be entitled to back-wages because he did not appear to be not in services; the personal observation of the learned Judge was that the present appellant-plaintiff appeared to be a man of means and in the township of Rajkot, where various avenues were available for the purpose of obtaining a job, the plaintiff must not have remained unemployed for a long period of nine years. The Appellate Court in accordance with its findings refused the back-wages.

2.3 Being aggrieved by the denial of the back-wages, the plaintiff is before this Court.

3. Shri Hathi, learned Counsel for the appellant, submits that as the causes are to the events, back-wages

are to the reinstatement. His submission is that in a given case where, for no fault of the employee the employee remains out, the employer cannot escape the liability of back-wages, nor the Court would be justified in holding that in the given set of circumstances, the plaintiff would not be entitled to back-wages. His further submission is that just on surmises and conjectures that other avenues were available to the plaintiff, the Court could not deny the back-wages. His submission, based upon the judgement of the Apex Court in the matter of ***Union of India vs. Madhusudan Prasad*** [***AIR 2004 SC 977***], is that back-wages must follow the event of reinstatement.

4. Shri Tanna, learned Counsel for the respondent, to jettison the arguments of the appellant, submits that ordinarily, back-wages follow the reinstatement, but, the condition precedent would be that such an employee, all through, had been unemployed and if he does not say so, then, he would not be entitled to back-wages. His submission is that even if the Court assumes that the reasons given by the Appellate Court for denying the back-wages are not germane to the issue or are legal or valid, then too, the decision given by the Appellate Court is right, justified and perfect. His further submission is that if the plaintiff, while in the witness

box, does not say that from the date of the termination till the date of the arguments or so, he was not gainfully employed and the defendant does not have an opportunity to cross examine the plaintiff, the back-wages cannot be awarded.

5. Undisputedly, the plaintiff, while in the witness box, did not say that he was not gainfully employed or right from the date of the termination, he was continuing to be unemployed awaiting the decision in the matter. In a given case, where the basic burden is upon the plaintiff to prove that he was unemployed and if he fails in discharging the said burden without even making one line statement that he remained unemployed, no Court could presume in favour of such plaintiff that the plaintiff remained unemployed. If the plaintiff fails to prove the case or substantiate his claim, then, it is not proper for any Court to grant the relief claimed.

6. In the matter of ***Union of India vs. Madhusudan Prasad*** (*supra*), the question before the Supreme Court was in relation to interpretation of Fundamental Rule 54, which provided that "*where a Government servant, who had been dismissed, removed or compulsory retired, is reinstated as a result of an appeal or review or would have been so reinstated, but, for his retirement or*

superannuation while under suspension or not, the authority competent to order reinstatement shall consider and make a specific order - (a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from the duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be, and (b) whether or not the said period shall be treated as the period spent on duty".

In the said case, the order of reinstatement was not made by the competent authority, but, they had been submitting before the Court that even if the reinstatement is directed by some judicial authority, the Competent Authority/Appointing Authority be given permission to exercise powers under Fundamental Rule 54. At that stage, the Supreme Court observed that such a power cannot be conferred upon the appointing authority because the Fundamental Rule shall apply to a case where on an appeal or review, the order of termination is reversed and there is a direction for reinstatement.

7. The case in the matter of ***Madhusudan Prasad*** (*supra*) was altogether on different facts, nor the said case places down a universal law that in every case where reinstatement is ordered, back-wages shall follow the

said event. The payment of back-wages, ordinarily, shall be allowed by the Court, but, that ordinary grant has to meet certain standards such as the person was not gainfully employed, he remained unemployed for all through and under the circumstances of the case, the Court is of the opinion that full or partial back-wages must be allowed. In the instant case, the Court below, in the opinion of this Court, though was not justified in giving the reasons for not awarding the back-wages, but, the decision was absolutely justified. In absence of a statement from the side of the plaintiff that he was not gainfully employed, the back-wages could not be awarded.

8. The question is answered against the interest of the plaintiff-appellant. The appeal deserves to and is, accordingly, dismissed. No costs.

[R.S.Garg, J.]

*kamlesh**